THE NEW-YORK

CITY-HALL RECORDER.

VOL. V. *April*, 1820. NO. 4.

At the SITTINGS, holden in and for the City and county of New-York, at the City-Hall, on the sixth and seventh days April, in the year of our Lord one thousand eight hundred and twenty--

BEFORE

The Honourable
AMBROSE SPENCER, *Chief Justice of the Supreme Court of Judicature of the State of New-York.*
JOHN M'KESSON, *Clerk.*

(SON ASSAULT DEMESNE—DAMAGES.)

WILLIAM COLEMAN,
vs.
HENRY B. HAGERMAN.

OGDEN, GRIFFIN & PRICE, *Counsel for the plaintiff.*
BOGARDUS, ANTHON & MAXWELL, *Counsel for the defendant.*

The defendant in an action for an assault and battery, who pleads *son assault demesne*, holds the affirmative; and, therefore, his counsel have a right on the trial to open the case and introduce testimony; but if it appear from all the evidence that he commenced the assault, the plaintiff's counsel have a right to open the case and conclude.

It is a general rule, that the party holding the affirmative on the record, has a right to open the case and conclude, but not where all the testimony negatives his affirmative allegation.

A previous conviction and fine, in the sessions, for an assault and battery, ought, on a trial, for the same offence in a civil tribunal, to go in diminution of damages on the score of *public example*, but not for the *private injury*.

This was an action for an assault and battery, alleged to have been committed on the 9th day of April, 1818. The damages were laid, in the declaration, at $10,000. The defendant pleaded the general issue, and (in a second plea) *son assault demesne*—that is, that the plaintiff himself first commenced the assault. To this plea the usual replication was interposed by the plaintiff.

The defendant, thus holding the affirmative on the record, it was considered on the trial, that his counsel had a right to open the case. This was done by Anthon, who then called and examined several witnesses, from whose testimony it appeared that the defendant himself first commenced the assault.

The defendant having rested, Price opened the case on behalf of the plaintiff, and introduced a number of witnesses. From the whole testimony, it appeared that the assault was commenced by the defendant.

After the evidence had closed, Anthon and Maxwell contended to the court, that as the defendant held the affirmative on the record, his counsel had a right, not only to open the case first, but to conclude; for the jury, not the court, were to decide whether the justification set up by the defendant was established. The counsel, in support of this doctrine, cited 1 vol. Bay, p. 248. 2 vol. Lill. Prac. Reg. p. 523. 2 vol. Trials *per pais*, p. 367.

The counsel for the plaintiff, on this point, were stopped by the judge, who said that there was no doubt but that it was a general rule, that the party holding the affirmative on the record, as in this case, had a right, on the trial, to open and conclude before the jury; but he thought it would be an utter perversion of justice, to suffer the defendant to deprive the plaintiff of that which is considered an important advantage on the trial, by interposing a plea, the allegation in which is expressly negatived by all the testimony. The spirit of the rule, undoubtedly, is, that he who, *in truth*, holds the affirmative, shall open and conclude. But, here, the defendant, for the mere purpose of gaining that advantage, has put on the record a plea which is not supported by any evidence in the cause.

His honour ruled that the plaintiff's counsel might conclude before the jury.

The cause was, accordingly, summed up by Bogardus and Maxwell for the defendant, and by Griffin and Ogden for the plaintiff.

The judge, in the course of his charge to the jury, instructed them that it was

their duty to give damages to the plaintiff on two grounds: first, for the injury to his feelings and person, and secondly, for the sake of *public example*, to deter others from the commission of similar offences; and that the conviction and fine in the sessions ought to go in diminution of the damages on the score of *public example*, but not on that for the *private injury*.

The jury rendered a verdict in favour of the plaintiff for $4,000 damages.

See the particular circumstances which gave rise to this suit, in the case of Henry B. Hagerman, tried in the sessions in June, 1818 (3d vol. of the City Hall Recorder, p. 73). He was then convicted and fined $250.

AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 3d day of *April*, in the year of our Lord one thousand eight hundred and twenty—

PRESENT,

The Honourable
CADWALLADER D. COLDEN, *Mayor.*
JOHN MORSS, and JOHN P ANTHONY, } *Aldermen.*
P. C. VAN WYCK, *District Att.*
JOHN W. WYMAN, *Clerk.*

SUMMARY—MARCH, 1820.

BURGLARY.

Richard Parcells, *al.* Dick Winship (the one who was states evidence against Ishmael Fraser, a black, convicted in the oyer and terminer, for arson, in the fall of 1815) John Devoe and Absolem Helmes were severally tried and convicted for burglary, and Parcells, and Devoe were sentenced to the state prison for life, and the sentence of Helmes was suspended.

FORGERY.

John Livingston, *al.* William Ward, James M'Menomon and Maria M'Intyre, were severally tried for this offence, and Livingston was sentenced to the state prison four years, M'Menomen five, and the sentence of M'Intyre was suspended.

GRAND LARCENY.

Absolem Helmes and Jacob Boles were tried and convicted of this offence in stealing the goods of William Hardy, and Lewis Perry, Jacob Cannon, jun. Samuel Williams and William Trusty, were each tried and convicted for the same offence in stealing the goods of A. Frith, and all the said prisoners, except Helmes, whose sentence was suspended, were sentenced seven years each to the state prison.

SUMMARY, APRIL TERM.

FORGERY.

William Hall, for forging the signature of Patrick Kavenaugh, endorsed on a promissory note, of $100, and passing the same to Peter La Cour the clerk of Ichabod Hoit, for paper sold and delivered, was tried and convicted for this offence, on the most conclusive testimony, and was sentenced seven years to the state prison.

GRAND LARCERY.

William Henry, *al.* John Belt, Prince Johnson, Peter Johnson and John Doty, were tried and convicted of this offence, and were each sentenced to the state prison for five years.

PETIT LARCENY.

Jeremiah Shepherd, George Fisher, Philip Smith, Jacob Boston, William Underhill, William Bowers, Diana Stephens, Jane Robinson, Jane Bogart, Cynthia Francis, Miles Slocum, William Cusheron, Mary Peterson, John Connor, Hannah Smith, Letty Jackson, Mary Williams, Jacob Simmons, Thomas Green, Charles Johnson, and John B. Gonzales, were severally convicted of this offence, and the five first named were sentenced to the penitentiary eighteen months each, the next fifteen months, the five following one year each, and the remainder, except the two last, whose sentences were suspended, were sentenced for shorter periods of time.